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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHIGAN EDUCATION ASSOCIATION-NEA, NATIONAL EDUCATION ASSOCIATION, CENTRAL MICHIGAN UNIVERSITY FACULTY ASSOCIATION, FERRIS FACULTY ASSOCIATION, GROSSE POINTE EDUCATION ASSOCIATION, GROSSE POINTE ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL, LANSING SCHOOLS EDUCATION ASSOCIATION, MENDON EDUCATION ASSOCIATION, TRAVERSE CITY EDUCATION ASSOCIATION,

Petitioners,

v.

ROBERT G. BROMLEY, PHILIP R. KINTZELE, KARL R. LINDFORS, FREDERICK M. PHELPS, III, KEN W. SMITH, JOHN B. MITCHELL, J. CARROLL ARNETT, ELLA M. GREGORICKA, THOMAS B. REED, THOMAS E. FAHLSTROM, TERRY L. APPS, SANDRA L. CONROY, CHARLENE L. MERRILL, VICKY L. NIEWOONDER, SALLY J. REDINGER, GORDON E. THOMAS, JAMES W. TROWBRIDGE, SHIRLEY A. TWIETMEYER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a union adopts a service (*i.e.*, agency) fee notice and collection system that complies with the procedural requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), including the requirement that objecting feepayers be afforded an opportunity to challenge the amount of the service fee that the union proposes to collect before an impartial arbitrator, does the First Amendment require that an objecting feepayer be afforded the right to a federal court review, on an entirely new factual record, of the arbitrator's findings as to the accuracy of the union's calculations of the amount of money that it expended for particular chargeable activities?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michigan Education Association-NEA, *et al.*, respectfully petition this Court to issue a writ of cer-

tiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Bromley v. Michigan Education Association-NEA* (6th Cir. Nos. 94-1164, 94-1210).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 82 F.3d 686, and is reprinted in the separately-bound Appendix to the Petition ("App.") at 1a. The opinion of the United States District Court for the Eastern District of Michigan is reported at 843 F. Supp. 1147, and is reprinted at App. 21a. The arbitration award which formed the predicate for the district court's decision is not officially reported, and is reprinted at App. 40a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was issued on April 26, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on June 17, 1996. App. 67a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Statement of Facts

This lawsuit was commenced by plaintiffs-respondents Robert Bromley, *et al.* ("plaintiffs"), who at all times relevant herein were employees of public school districts

in Michigan or of Central Michigan University, a public institution of higher education. During the 1991-92 school year—the year at issue here [1]—each of the plaintiffs was represented, and received the benefits of collective bargaining, by an association affiliated with petitioners Michigan Education Association-NEA ("MEA") at the state level, and petitioner National Education Association ("NEA") at the national level. Each of the plaintiffs chose not to join the local association that represented him or her.

Pursuant to state law, the collective bargaining agreements that were negotiated by the relevant local associations for the 1991-92 school year required non-members to pay agency fees (denominated under state law and in this Petition as "service fees") to the local associations, a portion of which in turn was allotted to MEA and NEA. (The local associations, MEA, and NEA are collectively referred to herein as the "unions.")

To implement the service fee provisions in the collective bargaining agreements, the unions established a procedure designed to comply with all applicable requirements of the First Amendment as set forth in this Court's decisions from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), through *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), to *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). That procedure begins with an elaborate accounting and record-keeping system designed to enable each of the unions to distinguish between expenditures for activities which are "germane to the union's duties as exclusive bargaining representative," *Lehnert*, 500 U.S. at 528—to which nonmembers constitutionally may be compelled to contribute—and expenditures for "ideological causes not germane to its duties as collective-bargaining representative," *Abood*, 431 U.S. at 235—to which nonmembers constitutionally cannot be compelled to contribute over their objection. Through

[1] Unless otherwise indicated, financial and other statistics cited in this Petition are for the 1991-92 school year.

this system, the unions are able to account for the activities of each of their employees and officers on a daily basis, and to attribute every other expenditure to particular programs or activities.[2]

At the conclusion of the school year, each of the unions—after reviewing all of the activity reports, vouchers, and other expenditures for the year, and after analyzing on an inch-by-inch basis each publication produced during the year—calculates, for each program or budgetary line item, the proportion of its money that was expended for "germane" and "non-germane" activities. Once the unions' calculations are completed, they are audited by the unions' independent auditors in accordance with standard auditing procedures. The unions then establish a reduced service fee for the current school year by discounting union dues for that year by the percentage of non-germane expenditures for the prior school year.[3]

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[2] For NEA, which has an annual budget in excess of $130 million, this requires weekly activity reports from approximately 550 employees, and a coding and record-keeping system to handle some 45,000 financial transactions. For MEA, which expends over $30 million per year, the record-keeping system involves 130 employees and over 20,000 financial transactions.

The over 1,000 local associations affiliated with MEA and NEA are much smaller, and only seven of those associations chose (or were able) to incur the record-keeping and auditing costs required to separate germane from non-germane expenditures. The rest of the local associations waived their right to require nonmembers to pay their fair share of the costs of collective-bargaining related activities. The seven local associations which did choose to establish a system for charging nonmembers for germane activities were all named as defendants in this lawsuit and are petitioners herein even though none of the individual plaintiffs belong to six of those associations. For purposes of this Petition, we focus on the conduct of petitioners MEA, NEA and the one local association—the Central Michigan University Faculty Association (with an annual budget of roughly $17,000)—that actually represented any of the plaintiffs.

[3] The local associations use the categorization system developed by MEA; their year-end calculations are made for them by MEA and audited by MEA's auditors.

After the audit is complete, the unions send a notice to each non-member informing the non-member of his/her obligation to pay a service fee, and also of his/her right to refuse to support activities not germane to the local association's role as exclusive representative. The notice includes a "Service Fee Election Form," which affords the nonmember three options: to pay a service fee equal to union dues; to pay the reduced service fee as calculated by the unions; or to pay the reduced service fee into an interest-bearing escrow account and to challenge the unions' calculation of the amount of the reduction. The nonmember is allowed to make the choice separately with respect to the local association, MEA, and NEA. To assist the non-member in making the choice, the non-member is given a copy of the audited schedule of germane and non-germane expenditures for the applicable local association, MEA and NEA, along with the letters from the auditors confirming the accuracy of these schedules and the summary guidelines used to distinguish germane from non-germane expenditures.

In 1991, throughout the state of Michigan, 236 employees represented by one of the more than 1,000 MEA affiliates—including the eighteen plaintiffs—challenged the amount of the reduced service fee. Under the unions' procedure, all of the money paid by these individuals was put into an interest-bearing escrow account, and their challenges automatically triggered an arbitration procedure. The arbitration was conducted under the auspices of the American Arbitration Association ("AAA") pursuant to its Rules for Impartial Determination of Union Fees ("AAA Rules"), which had been developed in response to *Hudson*.

Under the AAA Rules, an arbitrator is appointed by the AAA from a "special panel of arbitrators" established to adjudicate cases of this type. The arbitrator is charged with the responsibility of assuring that the parties—*i.e.*, the unions and the challengers—have "a fair opportunity

to contest the issues" and a "full opportunity for the presentation of relevant proofs." At the hearing, any party may be represented by counsel; may cross-examine witnesses; and may cause a stenographic record to be made (in which case that record must be made available to the other parties and the arbitrator). In addition, the arbitrator is specifically authorized to direct the parties to "produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."

Within thirty days after the closing of the record, the arbitrator is to issue a written award that is "in accordance with applicable law." Under the AAA Rules, "the burden is upon the union to justify whatever fees are being disputed."

In the instant situation, the arbitrator appointed by the AAA conducted a three-day hearing, at which the MEA and NEA officials responsible for implementing the service fee procedure testified at length concerning the methodology, judgments, and computations that had been used to arrive at the reduced fee for the 1991-92 school year. Through these witnesses, extensive documentary evidence was introduced into the record as well, including the full set of written guidelines used to distinguish between germane and non-germane activities, and spread sheets, work sheets, and memoranda used in making the necessary calculations.

Although all eighteen of the plaintiffs in this lawsuit challenged the unions' reduced service fee, the plaintiffs were advised by their counsel that participating in the arbitration proceeding was "unlikely to provide as much relief as legal action in court." Accordingly, only one plaintiff, Thomas Reed, attended the arbitration hearing, and his participation was limited: he attended only the first day of the hearing and questioned only the first two witnesses.

On April 16, 1992, the arbitrator issued a thirty-page Opinion and Award. After canvassing the legal background, the arbitrator concluded that "[t]he unions in this proceeding convinced the arbitrator that they had properly excluded all expenditures for political and ideological activities," and that "each chargeable category of expenses consisted of either a direct collective bargaining activity or an activity which is germane to the duties of an exclusive representative."

B. Proceedings Below

On October 6, 1992, plaintiffs commenced this lawsuit pursuant to 42 U.S.C. § 1983, alleging that they were being required to support "union activities which cannot constitutionally be financed from the compulsory fees of objectors." The complaint identified five specific categories of activities which, plaintiffs contended, improperly had been treated by the unions as germane to collective bargaining.

After filing their complaint, plaintiffs submitted a request for production of documents which called upon the unions to produce the entire arbitral record and each and every document "underlying, used in, created during, or otherwise related to Defendants' calculations, and their auditors' examinations, of Defendants' schedules of chargeable and nonchargeable expenditures." The unions produced only the arbitral transcript and exhibits plus the Election Forms filed by the 236 objectors, and then moved for summary judgment on the basis of that record and sought a protective order against further discovery. Plaintiffs opposed the summary judgment motion on two grounds:

1. Plaintiffs argued first that the motion was premature because they were entitled to discovery of the unions' books and records "in order to gauge the propriety of the Unions' calculations," and "reach an informed conclusion whether to accept or op-

pose [the unions'] determination of its chargeable and nonchargeable expenditures." J.A. 184, 182, 183.

2. On the merits, plaintiffs argued that certain categories of activities which the unions and the arbitrator had deemed to be germane to collective bargaining—and hence chargeable to objecting nonmembers—were not chargeable as a matter of law.

On January 11, 1994, the district court granted summary judgment for the unions. The district court ruled that, as a matter of substantive constitutional law, "the issue to be determined in this suit is not, per se, the correct amount of the fee to be charged to the plaintiffs," but rather "the constitutionality of the unions' definitions of categories of chargeable activities and expenditures," and "whether the computations were made in a [constitutionally] reasonable manner." App. 32a. The district court explained:

> Diligent review by courts of the categories of activities deemed chargeable by unions is the most important step that courts may take to protect First Amendment values.
>
> If auditors and arbitrators perform their roles in an adequate manner, the risks of burdening free speech is further diminished. The AAA's Rules for Impartial Determination of Union Fees are carefully crafted to accomplish this objective. [App. 31a]

The district court then proceeded to consider, and reject on the merits, plaintiffs' challenge (1) to the germaneness of various categories of activities for which they had been charged, App. 33a-37a, and (2) to certain aspects of the cost allocation system used by the NEA, App. 37a-38a. On that basis the court granted summary judgment for the unions.

Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the district

court's decision. The Court of Appeals ruled that the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment" encompasses the right to put at issue the unions' "cost allocations" and to "probe the[ir] factual underpinnings." App. 10a-11a, 12a, 17a. In the appellate court's view, it "would not be realistic . . . to expect the arbitrator to go through raw data at the hearing as thoroughly as litigants commonly go through such data in pre-hearing discovery." Accordingly, the court of appeals held that plaintiffs were entitled to discovery "of the materials on which the calculations were based." App. 12a. The court below rejected the unions' contention that this holding would render "the procedure spawned by the Supreme Court [in *Hudson*] largely a waste of time and money"; in the court's view, the only point—and justification—for the *Hudson* procedures is to "offer[] a potential for avoiding litigation." App. 13a-14a.[4]

REASONS FOR GRANTING THE WRIT

This Court's leading agency fee decisions establish both substantive standards and procedural requirements for the collection of union fees from objecting nonmembers. The substantive standards, initially set forth in *Abood*, have been developed and refined in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Lehnert*, *supra*, and there is a good measure of order on these issues in the lower courts. Precisely the opposite is true, however, with respect to the procedural requirements announced in *Hudson*. In the ten years since that decision was handed down, this Court has not spoken to the issue, and, as this lawsuit indicates, there is a need for further guidance.

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[4] On the substantive issues raised by plaintiffs, the Sixth Circuit agreed with the district court on most points, but held that expenditures "designed solely to allow the union[s] to perpetuate [themselves] by maintaining the loyalties of existing members . . . should be treated as non-chargeable." App. 18a-19a. Petitioners do not seek review by this Court of that holding.

There are three reasons why this Court should issue a writ of certiorari to review the lower court's holding.

First, the courts of appeals have developed two conflicting views as to the purpose and effect of the *Hudson* requirement that a service fee system must include a process for review of the fee calculations by an "impartial decisionmaker." One camp, led by the Seventh Circuit, considers the *Hudson* hearing requirement as an integral part of an overall system that vindicates First Amendment concerns without turning every factual question about the computation of a fee into an issue to be decided by a federal court *de novo* on an entirely new factual record. The other camp, led by the Sixth Circuit, reads *Hudson* as merely requiring unions to give objecting fee payers an alternative forum to use if they so choose, the only value of which is that it may dissuade objectors from proceeding in federal court. This disagreement in principle is most clearly manifest in those cases that consider whether would-be plaintiffs are required to present in a *Hudson* arbitration the issues they wish to litigate in federal court. That question, and the question presented here as to the role of the federal courts in adjudicating service fee claims after a *Hudson* arbitration, are plainly linked and the decision below rests on premises that have been rejected by the Seventh and Tenth Circuits in their decisions on the exhaustion issue. Part A.

Second, the decision below threatens to defeat the very point of *Hudson*. The *Hudson* procedures were expressly designed to "achieve th[e] objective" of "preventing compulsory subsidization of ideological activity by employees who object thereto"—and thus vindicating the objectors' constitutional rights—"without restricting the Union's ability to require every employee to contribute to the cost of collecive-bargaining activities." 475 U.S. at 302. That objective would be thwarted if the federal courts were drawn into superintending all of the computations entailed

in calculating a service fee. And that is especially true where, as here, the objectors bypass a *Hudson* arbitration and seek to use federal court processes to decide what factual determinations to challenge and then to litigate those issues *de novo*.

Third, the Sixth Circuit's decision here inevitably will embroil the district courts in that circuit in litigation that will, as Judge Ripple has warned, "place on overwhelming and unrealistic burden on the courts." Part C.

A. In *Hudson*, this Court held that because requiring service fee payments from employees who are represented by a union but who have chosen not to join the union implicates the First Amendment rights of these nonmembers, "[p]rocedural safeguards are necessary" in order to "minimize the infringement" on these First Amendment rights and to afford the "nonunion employee . . . whose First Amendment rights are being affected . . . a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." 475 U.S. at 302-03. To achieve these ends, this Court announced two basic procedural requirements: first, "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," *id.* at 306; and second, actual objectors must be afforded the right to have their "objections addressed in an expeditious, fair, and objective manner," *id.* at 307.

With respect to the second requirement, the *Hudson* Court expressly "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient," *id.* at 307 n.20, but also rejected the proposition that "a full-dress administrative hearing . . . is part of the 'constitutional minimum,'" *id.* at 308 n.21. Instead, the Court suggested that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* The Court faulted the arbitration procedure the union had adopted in *Hudson*, however, because the arbitrator in that case was

selected solely by the union and hence was not impartial. *Id.* at 308 & n.21.[5]

Because the procedure at issue in *Hudson* did not provide for an impartial decisionmaker, this Court had no occasion in that decision to expand on the role the federal courts should play where a constitutionally adequate procedure is in place.[6] In attempting to fill this vacuum, the courts of appeals have fallen into basic disagreements.

(1) To start with the most basic, the appellate courts are in square conflict over whether, as Justice White and Chief Justice Burger concluded in their concurring opinion in *Hudson*, *see supra* note 6, objecting fee payers are required to exhaust a proper *Hudson* procedure, where it exists, before challenging a service fee in federal court.

On remand in *Hudson*, the Seventh Circuit answered that question in the affirmative, and refused to pass on the objectors' challenge to the reduced service fee once a proper notice and hearing procedure was put in place. Writing for the court, Judge Ripple reasoned:

> Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and

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[5] In the wake of *Hudson*, unions generally have sought to establish the kind of arbitration procedure that this Court suggested would suffice by invoking the AAA Rules. The courts of appeals have concluded that the AAA process satisfies the hearing requirement of *Hudson*. *E.g.*, *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Andrews v. Education Ass'n*, 829 F.2d 335, 340-41 (2d Cir. 1987); *Ping v. NEA*, 870 F.2d 1369, 1372-74 (7th Cir. 1989).

[6] In a footnote, *Hudson* states, without further explication, that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." 475 U.S. at 308 n.21. And, in a concurring opinion, Justice White and Chief Justice Burger expressed their view that "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311.

> irrelevant the requirements that an impartial decision-maker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. . . . The federal court does not, at this stage, review the fee calculation. . . . [*Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) (emphasis in original)]

The Tenth Circuit recently has "conclude[d that] the Seventh Circuit's holding in *Hudson* was correct," and has "adopt[ed] it as the law of this Circuit." *Lancaster v. Air Line Pilots Ass'n Int'l*, 76 F.3d 1509, 1522 (10th Cir. 1996).

The Sixth Circuit has reached precisely the opposite conclusion, and this conclusion formed a predicate for the decision below. In *Tierney v. City of Toledo*, 917 F.2d 927, 940 (6th Cir. 1990), that court held that an exhaustion requirement in a service fee procedure "unduly implies a limitation upon the [objectors'] constitutional rights," and therefore "must be deleted from the plan." In the instant lawsuit, the court of appeals reaffirmed *Tierney*, which the court read as "squarely reject[ing] the proposition that it is constitutional for [a service fee] agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims." App. 15a-16a.[7]

(a) This conflict over the exhaustion issues reflects a larger disagreement among the circuits—one which goes to the very heart of the issues in the instant lawsuit—about the purpose of the *Hudson* arbitration requirement and about the respective roles of the arbitrator and the court.

Underlying the Seventh Circuit's exhaustion rule is that court's understanding, expressed by Judge Ripple in *Hud-*

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[7] *See also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 285 (D.C. Cir. 1993) (noting, but declining to resolve, the circuit conflict); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), discussed below.

son, that "[r]equiring the federal courts to micromanage the fee calculation in every case challenging a union's [service] fee would place an overwhelming and unrealistic burden on the courts." 922 F.2d at 1314. The Tenth Circuit in *Lancaster* likewise stated that, absent exhaustion, it would "be forced to micromanage the fee calculation in every case challenging a union assessment." 76 F.3d at 1522.

Hudson and *Lancaster* thus teach that not every factual issue that can be raised in a *Hudson* arbitration regarding the calculations that go into the reduced service fee is necessarily of constitutional magnitude, and these cases indicate the need for a line between the role of the arbitrator and the court so that the courts are *not* called upon to "micromanage" the computation process. The Third Circuit's decision in *Hohe v. Casey, supra*—which stakes out an intermediate position on the exhaustion question—establishes just such a line.

In *Hohe*, Judge Seitz distinguished between "challenges 'to the propriety of the . . . fee' . . . [which] are, simply stated, challenges to the *chargeability* of an activity," and "challenges to the *amount* of a chargeable fee." *Hohe*, 956 F.2d at 408 & n.4 (emphasis added). According to *Hohe*, challenges of the former type—which raise issues like those raised in *Ellis* and *Lehnert* as to whether objecting nonmembers may be compelled to support particular categories of activities—are for the courts and need not be raised first in arbitration; challenges of the latter type—which involve the unions' calculations as to the amount expended for particular categories of activities—should be decided (at least in the first instance) by the arbitrator.

The line drawn in *Hohe* for purposes of exhaustion is precisely the one which the district court drew—and which the court of appeals rejected—in the instant lawsuit for purposes of defining the constitutional issue posed and hence the scope of federal court review. The district

court here recognized its responsibility to "[d]illigent[ly] review . . . the *categories of activities deemed chargeable by [the] unions*" as well as the procedures used by the union, but refused to be drawn into deciding whether the unions' calculations were correct down to the final penny. *Supra* p. 8. The court of appeals took precisely the opposite view. Reasoning that it "would not be realistic . . . to expect the arbitrator to go through raw data" concerning the unions' calculation of the amount of the service fee, the court below concluded it was appropriate in the federal court litigation to "probe the factual underpinnings" of "the unions' cost allocations." *Supra* p. 9. Accordingly, the court of appeals permitted the discovery at issue here.

The tension between the decision below and *Hudson*, *Lancaster*, and *Hohe* is thus clear.

B. In opening up the federal courts to disputes as to the calculation of service fee reductions, the decision below breaks faith with the rationale of *Abood* and *Hudson*. This is true in two separate respects.

(1) The constitutional right recognized in *Abood* is the "right to withhold . . . support of ideological causes to which [an individual nonmember] objects." 431 U.S. at 241. The constitutional "objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricing the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237, *quoted in Hudson*, 475 U.S. at 302.

It was expressly to "achieve this objective," 475 U.S. at 302, that this Court in *Hudson* imposed various procedural requirements on unions, including the requirement for review by an "impartial decisionmaker." And lession is clear: so long as a union draws the constitutionally correct line between chargeable and nonchargeable expenditures, and applies that line through constitutionally

required procedures, the First Amendment right "to withhold support of ideological causes" is fully protected. It follows that the judicial role is to police the line that the union draws and the processes it follows, but not to exercise superintendence over every mathematical exercise entailed in calculating the service fee.[8]

(2) Even if alleged constitutional errors in calculating a service fee were to raise issues of constitutional moment, at least this must is clear: allowing the discovery plaintiffs here seek as a preclude to litigating *de novo*, on an entirely new factual record, the unions' calculations of the reduced service fee would defeat the purpose of *Hudson*. By plaintiffs' own admission (in an affidavit they submitted in opposition to the unions' motion for summary judgment), plaintiffs' discovery request—for every document "underlying, used in, created during, or otherwise related to [the unions'] calculations"—was designed to enable plaintiffs to "gauge the propriety of the Unions' calculations," and "reach an informed conclusion whether to accept or oppose [the union's] determination of its chargeable and nonchargeable expenditures." *Supra* pp. 7-8.

But, if plaintiffs wanted to "reach an informed conclusion whether to accept or oppose the [union's] determination," the forum to do so was the *Hudson* arbitration. For as this Court explained in *Hudson*, the precise purpose of the procedural requirements is to enable potential objectors to "identify the impact of the governmental action on [their] interests." 475 U.S. at 303. By allowing plaintiffs to sit out that procedure, and then invoke

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[8] *Cf.* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526 (1970) ("So far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies, at least if . . . the agencies' procedures appear reasonably capable of ensuring reliable findings"); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

the federal court's processes to "gauge the propriety of the Union's calculations" and to relitigate factual issues that were the subject of the arbitration hearing, the court below has drained the logic out of *Hudson*'s suggestion that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 308 n.21.

C. The practical consequences of the Sixth Circuit's decision are large.

As the instant lawsuit illustrates, although most nonmembers are content to pay a service fee that is either equal to the full amount of union dues or a reduced fee calculated by the union, nonetheless the law of large numbers assures that there is a ready pool of would-be plaintiffs to challenge service fees (for whom the Right to Work Foundation provides legal representation at no cost, and without regard to the small financial stakes involved). As a result, service fee litigation has become a staple of the federal courts' diet.

To date, the litigation has focused largely on the category of activities for which objectors may be charged and on the adequacy of the union's notice and procedures.[9]

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[9] For cases on the chargeability of various categories of expenditures, *see, e.g., Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 2, 1996 (No. 96-186); *Jibson v. Michigan Educ. Ass'n*, 30 F.3d 723 (6th Cir. 1994); *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295 (4th Cir.) (en banc), *cert. denied*, 510 U.S. 869 (1993); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123 (10th Cir. 1991); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492 (N.D. Cal. 1992). For cases challenging the procedures, *see, e.g., Jibson v. Michigan Educ. Ass'n, supra*; *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991); *Tierney v. City of Toledo, supra*; *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Ping v. NEA, supra*; *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989);

When filed five years ago, the instant lawsuit was conceded by plaintiffs' counsel to be "the first" to challenge "computation of the amount of fees." App. 29a & n.7. The decision below opens the door to a new generation of litigation far more costly and complex than anything that has preceded it. The instant lawsuit is illustrative.

MEA and NEA alone expend approximately $170 million annually—in over 60,000 financial transactions a year. Under the position taken by the Sixth Circuit, each of those 170 million dollars, and each of those 60,000 financial transactions, represents a potential object of discovery and dispute in the federal courts. Alleged errors made in measuring inches on a publication page, in dividing salaries by hours worked, in adding numbers are all fair game for federal court review. Issues tried before the arbitrator can be retried, *de novo*, in court. And this is true not just for the MEA and NEA, and not just for the 1991-92 school year, but for each of the thousands of bargaining units in which service fee calculations are made each and every year.

Judge Ripple's warning could not be more apt: opening the doors of the federal courts to these lawsuits "would place an overwhelming and unrealistic burden on the courts." *Supra* p. 13.

Damiano v. Matish, supra; *Andrews v. Education Ass'n, supra*; *Hudson v. Chicago Teachers, supra*; *Hohe v. Casey, supra*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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